

# H TO B OR NOT TO BE: WHAT GIVES FOREIGNERS THE RIGHT TO COME HERE AND CREATE AMERICAN JOBS?

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“Some may call it mysticism if they will, but I cannot help but feel that there was some divine plan that placed this continent here between the two great oceans to be found by people from any corner of the earth—people who had an extra ounce of desire for freedom and some extra courage to rise up and leave their families, their relatives, their friends, their nations and come here to eventually make this country.” – Ronald Reagan<sup>1</sup>

## I. INTRODUCTION

Cisco Systems is to networking what Intel is to processors and Microsoft is to operating systems.<sup>2</sup> Yet, Pradeep Sindhu, the co-founder of Juniper Networks, knew he could enhance the status quo—he knew he could do networking better.<sup>3</sup> Born in Bombay, India, Dr. Sindhu co-founded Juniper Networks in 1996.<sup>4</sup> Juniper specializes in providing network infrastructure and is known for its high-end routers and switches.<sup>5</sup>

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<sup>1</sup> Ronald Reagan, former President of the U.S., Speech at the Westminster College Cold War Memorial (Nov. 9, 1990).

<sup>2</sup> See Juniper Networks, Inc., Annual Report (Form 10-K), at 11 (Dec. 31, 2009). In the network infrastructure business, Cisco Systems has historically been the dominant player in the market. *Id.*

<sup>3</sup> See *How a Rocket Took Off: Juniper Founder Pradeep Sindhu*, SRAMANA MITRA (Feb. 17, 2010), <http://www.sramanamitra.com/2010/02/19/how-a-rocket-took-off-juniper-founder-pradeep-sindhu-part-3/>. Mitra has been an entrepreneur and strategy consultant in Silicon Valley since 1994. *Id.*

<sup>4</sup> *Company Background*, JUNIPER NETWORKS, INC., <http://www.juniper.net/us/en/company/profile/history/> (last visited Mar. 29, 2011). From the start, Juniper saw an opportunity to help customers build and accelerate business value from their IT infrastructures. *Id.* Since then, the company has helped customers stay ahead of the demands posed by the exponential growth in network users and end-points. *Id.*

<sup>5</sup> *Profile and Overview of Juniper Networks, Inc.*, REUTERS, <http://www.reuters.com/finance/stocks/companyProfile?rpc=66&symbol=JNPR.K> (last visited Mar. 30, 2011). Juniper Networks, Inc., incorporated in 1996, designs, develops and sells network infrastructure related products and services. *Id.* The company is an industry leader and maintains a reputation for providing “responsive

Today, Juniper is a \$3.3 billion dollar company, with 7200 employees worldwide.<sup>6</sup>

Pradeep Sindhu's story, however, began twenty years earlier, in India.<sup>7</sup> Sindhu, with an interest in engineering, attended the Indian Institute of Technology in Kanpur and studied electrical engineering.<sup>8</sup> Traditionally, the next step was to obtain a higher education degree.<sup>9</sup> He applied to a number of graduate programs in the United States and gained admission to the University of Hawaii in 1975.<sup>10</sup> A year later he entered Carnegie Mellon to pursue a Ph.D. in computer science.<sup>11</sup>

Sindhu's education led to an opportunity at Xerox's Palo Alto Research Center ("PARC") in the heart of Silicon Valley.<sup>12</sup> He recalls that his eleven years at PARC provided a unique combination of innovation and inquiry that helped set the stage for Juniper Networks.<sup>13</sup> Noting the explosive growth of the Internet and the importance of connecting computers, Sindhu was struck by the enormous potential of the router—the fundamental building block of the network.<sup>14</sup> His story captures the essence of entrepreneurship.

Yet Pradeep Sindhu is not alone. Immigrant entrepreneurs contribute significantly to job creation and economic growth in the United States. Take, for example, Sergey Brin, the Russian-born co-founder of Google, Andy Grove, the Hungary-born member of the Intel founding team and Vinod Khosla, the India-born co-founder of Sun Microsystems.<sup>15</sup>

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and trusted environments for accelerating the deployment of services and applications over a single network." *Id.* Juniper's products include routing, switching, security, application acceleration, identity control, and network management systems designed to increase performance and flexibility. *Id.*

<sup>6</sup> Juniper Networks, Inc., Annual Report, *supra* note 2, at 3, 12.

<sup>7</sup> *How a Rocket Took Off: Juniper Founder Pradeep Sindhu*, *supra* note 3, at 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Sindhu recalls: "[My education has been] absolutely, incredibly valuable. The theoretical background and breadth of knowledge [that I gained] have let me do things I otherwise would not have been able to do." *Id.*

<sup>12</sup> *Id.* See generally *About Us*, PARC, A XEROX COMPANY, <http://www.parc.com/about/> (last visited Feb. 22, 2011). Parc is a world-renowned center for commercial innovation. *Id.* The lab works closely with global enterprises, entrepreneurs, government agencies and private entities, to invent, co-develop, and bring to market new technologies. *Id.*

<sup>13</sup> *How a Rocket Took Off: Juniper Founder Pradeep Sindhu*, *supra* note 3, at 1.

<sup>14</sup> *Company Background*, *supra* note 4.

<sup>15</sup> *Executive Officers*, Sergey Brin, GOOGLE, INC., <http://www.google.com/corporate/execs.html> (last visited Feb. 22, 2011); see also *About Andy Grove*, Intel Co-founder, INTEL, INC., <http://www.intel.com/pressroom/kits/bios/grove.htm> (last visited Feb. 22, 2011); see also *About Our People*, Vinod Khosla, KHOSLA

Immigrant technologists like these have transformed the American economy, creating wealth and jobs.<sup>16</sup>

Congress, realizing the growing importance of immigrant entrepreneurs, created a permanent allocation of H-1B visas for skilled workers in 1990.<sup>17</sup> Since then, the program has fed skilled workers to top-tier U.S. technology companies and universities.<sup>18</sup> Sponsoring employers are able to secure talented computer programmers and engineers from around the world.<sup>19</sup> In fact, companies often seek foreigners through this program because they are unable to find Americans with the skills they need.<sup>20</sup>

However, while the current administration claims to be trying to lower administrative barriers, the reality is that it is harder than ever for companies to hire foreign technologists.<sup>21</sup> As the debate rages on, technology companies must deal with stagnating H-1B cap levels, increasingly restrictive administrative rulings, court cases and attorney's fees. In fact, President Obama recently signed legislation that increases overall application fees, in addition to recently enacted administrative fees.<sup>22</sup>

High-tech companies, business leaders and venture capitalists are complaining that the new rules and regulations have made it increasingly difficult to hire the world's top talent and are lobbying Congress to curb fees and loosen restrictions.<sup>23</sup> However, on the other side, proponents of

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VENTURES, [http://www.khoslaventures.com/khosla/people\\_vk.html](http://www.khoslaventures.com/khosla/people_vk.html) (last visited Feb. 22, 2011). As an example, Khosla grew up dreaming of being an entrepreneur, despite growing up in a household with no business or technology connections. *Id.* Since he first heard about Intel starting up, at the age of 16, he dreamt of creating his own technology company. *Id.*

<sup>16</sup> Matt Richtel, *In Silicon Valley, Recruiting Clashes with Immigration Limits*, N.Y. TIMES, Apr. 12, 2009, at A1.

<sup>17</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 205(a), 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1184 (2006)).

<sup>18</sup> Miriam Jordan, *Slump Sinks Visa Program*, WALL ST. J., Oct. 29, 2009, at A1.

<sup>19</sup> *Id.*

<sup>20</sup> Nick Leiber, *Why It's Getting Harder to Hire Foreign Workers*, BLOOMBERG BUSINESSWEEK, Aug. 30, 2010, at 54-55.

<sup>21</sup> Maureen Farrell, *The Startup Case for Immigration Reform*, FORBES (Nov. 23, 2010, 1:10 PM), <http://blogs.forbes.com/maureenfarrell/2010/11/23/startups-case-for-immigration/>. The U. S. Chief Technology Officer, Aneesh Chopra, claims that President Obama is trying to lower administrative barriers for bringing foreign nationals into the US for professional development. *Id.* Chopra states, "We are obviously committed to comprehensive solutions for immigration reform." *Id.*

<sup>22</sup> Act of August 13, 2010, Pub. L. No. 111-230, § 402(b), 124 Stat. 2485, 2487 (2010).

<sup>23</sup> Richtel, *supra* note 16. "Technology executives say that byzantine and increasingly restrictive visa and immigration rules have imperiled their ability to

the recently enacted regulations advocate for protecting jobs for American citizens.<sup>24</sup> Politicians and interest groups are seeking more restrictions in response to their concern over displaced U.S. workers.<sup>25</sup> The debate is not a new one—it has existed since the inception of the H-1B program.<sup>26</sup>

With the recent economic downturn, the debate has escalated as jobless Americans complain about layoffs and politicians look for places to direct

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hire more of the world's best engineers." *Id.* See also Leiber, *supra* note 20. Craig Regelbrugge, government relations chief at the American Nursery & Landscape Association claims that fees and other costs (new rules) are "fundamentally anti-employer on almost every level." *Id.* See also Jordan, *supra* note 18. Businesses complain that qualified employees in the United States are hard to come by. *Id.* "Many domestic MBA graduates fail to perform simple Algebra. There is a lack of fundamental training in the US education system." *Id.*

<sup>24</sup> *Id.* Alternatively, opponents of H-1B reform claim that there are plenty of Americans to perform tech-related jobs. *Id.* Kim Berry, an engineer who operates a nonprofit advocacy group for American-born technologists states, that "[t]here are probably two billion people who would like to live in California and work, but not everyone in the world can live here." *Id.* A number of United States Senators continue to call for restrictions on the H1-B program because they claim it displaces American workers. *Id.*

<sup>25</sup> Jordan, *supra* note 18. Senator Charles Grassley, an Iowa Republican, and Senator Richard Durbin, an Illinois Democrat are among the most vocal of opponents. *Id.* They want to require companies to make an effort to hire U.S. workers first. *Id.*

<sup>26</sup> *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings Before the Subcomm. of the Comm. on the Judiciary, 82nd Cong. 315-316 (1951) [hereinafter Immigration Hearings].* For the last sixty years, opponents of immigration reform have echoed similar concerns with respect to temporary workers. *Id.* The following excerpt was recorded before passage of the Immigration and Nationality Act of 1952—the original Immigration and Nationality Act. *Id.*

Mr. Carroll: Let us take a precise case, not in our case, but one where a French perfume manufacturer wished to bring in a person to run his mixing room. I think he should be able to do it. On its merits, it is good . . . Mr. Arens: Well would this perfume manufacturer be coming here to perform temporary services or labor of a kind that cannot be found in this country? . . . If you can find in this country a man or men who are unemployed but who are equally qualified in perfume mixing why should we bring in as non-immigrants people from abroad? Mr. Carroll: I mean, the interests of the United States as interpreted by the United States. I think that throws you off again into a different area. What we are talking about is a man who has an investment here . . .

*Id.*

blame.<sup>27</sup> The ultimate result of the recent debate has created an anti-immigrant sentiment for both immigrants and the companies seeking to sponsor them.<sup>28</sup> The concern is what impact the recent changes in immigration policy will have on innovation and entrepreneurial business.

## II. INNOVATION AND ENTREPRENEURSHIP

As early as 1911, Joseph Schumpeter described the function of entrepreneurs as bringing about economic development, by introducing *innovations* as “new combinations.”<sup>29</sup> He examined the economic, social, and cultural origins of change and innovation in the process of economic development within a largely economic framework, and concluded that ultimately, the entrepreneur is the source of qualitative economic development (as opposed to “mere” economic growth).<sup>30</sup>

Similarly, economist Bill Gartner states that “despite the number of published papers that might be considered related to the theory of entrepreneurship, no generally accepted theory of entrepreneurship has emerged.”<sup>31</sup> While questions linger as to how the “field of entrepreneurship” should be defined, implicit in the concept is innovation.<sup>32</sup> He considered: why, when and how opportunities for the creation of goods and services come into existence; why, when and how some people and not others discover and exploit these opportunities; and why, when, and how are different modes of action used to exploit entrepreneurial opportunities.<sup>33</sup>

The H1-B visa program helps answer these questions. As one of many platforms, it is an important source of innovation and is an integral part of entrepreneurship in America.

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<sup>27</sup> Richtel, *supra* note 16; *Economy Remains Top Issue on Voters' Minds*, RASMUSSEN REP. (Nov. 18, 2010), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/november\\_2010/economy\\_remains\\_top\\_issue\\_on\\_voters\\_minds](http://www.rasmussenreports.com/public_content/politics/general_politics/november_2010/economy_remains_top_issue_on_voters_minds). For the week ending Sunday, November 14, 2010, forty-three percent of likely voters nationwide said economic issues such as jobs and economic growth are most important in terms of how they will vote in the next national election. *Id.*

<sup>28</sup> Richtel, *supra* note 16. Would be employers say that the process is “invasive” and “stressful” to both sponsors and employees. *Id.*

<sup>29</sup> JOSEPH A. SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT: AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST, AND THE BUSINESS CYCLE* (Harv. U. Press 1934) (1911).

<sup>30</sup> *Id.*

<sup>31</sup> William Gartner, *Is There an Elephant in Entrepreneurship? Blind Assumptions In Theory Development*, 25-4 *ENTREPREN. THEORY & PRACT.* 320 (2001).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

## III. IMMIGRANT ENTREPRENEURSHIP

In 2006, the National Venture Capital Association released a study illustrating the propensity of immigrants to start and grow successful American companies within technological industries.<sup>34</sup> The study found that, dating back to 1990, twenty-five percent of venture-backed public companies in the United States were started by immigrants.<sup>35</sup> Further, in 2005, the market capitalization of publicly traded, immigrant-founded, venture-backed companies in the United States exceeded \$500 billion, illustrating the wealth creating ability of immigrant entrepreneurs.<sup>36</sup> At that time, some of the largest venture-backed public companies started by immigrants included Intel, Solectron, Sanmina-SCI, Sun Microsystems, eBay, Yahoo!, and Google, among others.<sup>37</sup> Combined, these companies employed over 260,000 people in 2005.<sup>38</sup>

In a highly publicized study in 2007, Vivek Wadhwa documented the economic and intellectual contributions of immigrant technologists and engineers at the national level.<sup>39</sup> To understand the economic impact, the study looked at a large sample of all engineering and technology companies founded in the last ten years to determine whether a key founder was an immigrant.<sup>40</sup> Similarly, the study analyzed the World Intellectual Property

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<sup>34</sup> Stuart Anderson & Michaela Platzer, NAT'L VENTURE CAPITAL ASS'N, AMERICAN MADE: THE IMPACT OF IMMIGRANT ENTREPRENEURS AND PROFESSIONALS ON U.S. COMPETITIVENESS (2006). Commissioned by the National Venture Capital Association ("NVCA"), this study serves to provide an objective overview of the impact of immigrant entrepreneurs and professionals on the economy. *Id.* The report compiles demographic data on all publicly traded, U.S. companies and over 340 privately held U.S. companies, survey data from immigrant entrepreneurs and H-1B professionals and government data that highlights the importance of foreign-born scientists and engineers in the U.S. *Id.* Stuart Anderson is the executive director of the National Foundation for American Policy. *Id.* Michaela Platzer is the president of Content First, Inc. *Id.*

<sup>35</sup> *Id.* at 11.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 13.

<sup>38</sup> *Id.*

<sup>39</sup> VIVEK WADHWA ET AL., AMERICA'S NEW IMMIGRANT ENTREPRENEURS (2007). This study assesses the correlation between skilled immigrants and the creation of engineering and technology businesses and intellectual property in the United States. *Id.* Vivek Wadhwa is a technology entrepreneur and an Executive in Residence for the Pratt School of Engineering at Duke University. *Id.* He also mentors and advises startups and is a columnist for BusinessWeek.com. *Id.*

<sup>40</sup> *Id.* at 8. Researchers obtained a list of all companies founded in the last ten years (1995–2005) from Dunn & Bradstreet's Million Dollar Database. *Id.* The database contains U.S. companies with more than \$1 million in sales and twenty or more employees. *Id.* Knowledgeable company employees were then surveyed as to

Organization (“WIPO”) patent databases to determine the ethnicity of patent holders.<sup>41</sup> The study found that in 25.3% of the identified companies, at least one key founder was foreign-born.<sup>42</sup> Further, foreign nationals residing in the U.S. were named as inventors or co-inventors in 24.2% of international patent applications filed from the U.S. in 2006.<sup>43</sup> The results show a national pattern of skilled immigrants leading innovation and creating jobs and wealth.<sup>44</sup>

Similarly, a recent study found that sixteen percent of “rapidly-growing, high-impact, high-tech companies,” have at least one foreign-born immigrant as a founder.<sup>45</sup> According to the analysis, one commonly accepted explanation for entrepreneurial opportunity recognition is alertness—some people are on the lookout for opportunities, while others are not.<sup>46</sup> Thus, the report claims, immigrants may be more alert to entrepreneurial opportunity than an average person, because those who come to the United States for education or employment have, at a minimum, identified a unique value creating opportunity.<sup>47</sup>

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whether any company founders were immigrants to the U.S. and, if yes, from what country. *Id.*

<sup>41</sup> *Id.* at 10. Researchers were constrained to analyzing patent data for “immigrant non-citizens.” *Id.* Any former immigrants, those granted citizenship, were not counted because of a lack of data. *Id.*

<sup>42</sup> *Id.* at 11.

<sup>43</sup> *Id.* at 25. A 1999 report on the economic contributions of skilled immigrants to the California economy focused on the development of Silicon Valley’s regional economy and the roles of immigrant capital and labor; Anna Lee Saxenian, *Silicon Valley’s New Immigrant Entrepreneurs* (Center for Comp. Immigr. Stud., U. of Cal., San Diego, Working Paper No. 15, 2000). Saxenian found that foreign-born scientists and engineers were generating new jobs and wealth for the California economy. *Id.* Wadhwa expanded the concept of Saxenian’s study and found that the results are a nationwide phenomenon. *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Matthew Bandyk, *Capital Commerce: Immigrants a Driving Force Behind Innovative Firms, Study Finds*, US NEWS (July 16, 2009), <http://money.usnews.com/money/blogs/capital-commerce/2009/07/16/immigrants-a-driving-force-behind-innovative-firms>. Matthew Bandyk reports that a Small Business Administration Office of Advocacy study focused on “rapidly-growing, high-impact, high-tech companies” because these companies have a dramatically disproportionate impact on job growth and overall economic growth. *Id.* These companies generally have high sales high sales growth and employment growth. *Id.* The study concludes that one to ten percent of new firms generate forty to seventy-five percent of new jobs. *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

## IV. THE H1-B PROGRAM

"Today, as never before, a sound immigration and naturalization system is essential to the preservation of our way of life, because that system is the conduit through which the stream of humanity flows into the fabric of our society." – Pat McCarran<sup>48</sup>

Congress, realizing the importance of immigrant laborers, created the H1-B visa category for skilled workers in 1952, as part of the Immigration and Nationality Act ("INA") of 1952.<sup>49</sup> However, until the 1965 INA restructured "national origin formulas," immigrants were numerically restricted according to their country of origin.<sup>50</sup> As technological advancements picked up throughout the next quarter-century, Congress enlarged the worldwide "cap" and set aside 65,000 permanent H-1B visa slots in 1990.<sup>51</sup> The move was largely intended to provide a sufficient "flow" of immigrant technologists, engineers and scientists to fuel tech-growth.<sup>52</sup> In hearings before the INA of 1990, lawmakers cited the supply

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<sup>48</sup> *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings Before the Subcomm. of the Comm. on the Judiciary*, *supra* note 26, at 1–2.

(Statement of Sen. Pat McCarran, Chairman, Comm. On the Judiciary).

<sup>49</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 62 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (2006)); *see Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings Before the Subcomm. of the Comm. on the Judiciary*, *supra* note 26, at 122; *see generally* PUB. PAPERS OF THE PRESIDENTS OF THE U.S., HARRY S. TRUMAN, 1952-53, 442 (Gov't Printing Office 1966). Also known as the McCarran-Walter Act, the Immigration and Nationality Act of 1952 was passed over Truman's veto. *Id.* With respect to his veto, Truman maintained that the INA "would continue, practically without change, the national origins quota system." *Id.*; *see generally* Immigration and Nationality Act of 1952, § 201(a), 62 Stat. 163.

<sup>50</sup> Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C. (2006)). The new law finally abolished national quotas, substituting hemispheric caps instead. *Id.* Immigrants were restricted to 170,000 for the Eastern Hemisphere, and 120,000 for the Western Hemisphere, with a limit of 20,000 annually from any nation. *Id.*

<sup>51</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C. (2006)). Several changes made by the 1990 Act are of particular relevance. Under the previous law, the annual allocation of numerically restricted visas was 270,000. 1965 Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911. The 1990 Act established a "flexible" worldwide cap on family-based, employment-based, and diversity immigrant visas. Immigration Act of 1990, 104 Stat. 4978. It set separate ceilings for each of the immigrant categories: 140,000 employment-based visas, 65,000 of which are for H-1B workers. Immigration and Nationality Act of 1990, § 201(d)(A), 205(a), 104 Stat. 4978.

<sup>52</sup> *Id.*



of foreign workers, which was not keeping up with the demands of American business in the international community, in support of the H-1B program.<sup>53</sup> Policymakers noted the economic benefits derived from the program, such as enhanced trade and increased movement of people, products and ideas.<sup>54</sup>

Today, the program feeds skilled workers to top-tier U.S. technology companies and universities.<sup>55</sup> Companies often seek foreigners through this program because they are unable to find Americans with the skills they need.<sup>56</sup> Like Pradeep Sindhu, many immigrants get their break through the program.<sup>57</sup> Recall, Sindhu spent eleven years at Xerox's PARC lab, which helped set the stage for founding Juniper Networks.<sup>58</sup> Looking at the H-1B program as a business incubator makes the immigrant-innovation connection clearer.<sup>59</sup>

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<sup>53</sup> H.R. REP. NO. 101-723, at 43 (1990). The report confirms the goal of the H-1B program: to address the need for "entry-level workers with highly specialized knowledge." *Id.* at 66. Such workers "are needed in the United States and sufficient U.S. workers are sometimes not available." *Id.*

<sup>54</sup> *Id.* at 67.

<sup>55</sup> Jordan, *supra* note 18.

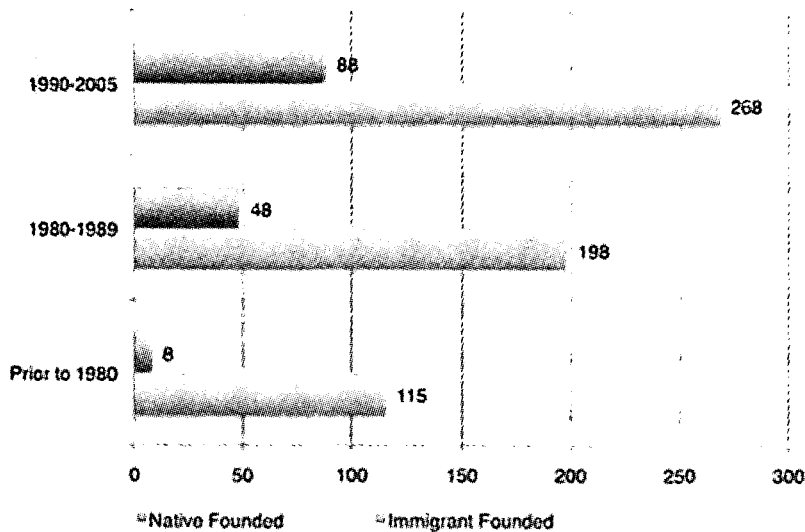
<sup>56</sup> Leiber, *supra* note 20.

<sup>57</sup> Jordan, *supra* note 18; see Anderson & Platzer, *supra* note 34. In the NVCA study, researchers uncovered the type of H-1B employees hired from the companies participating in the survey. *Id.* The results showed seventy percent hiring in engineering, thirty-five percent in IT and programming, seventeen percent in executive positions and thirteen percent in marketing and sales. *Id.* The study concludes that H-1B contributions are primarily technology related. *Id.*

<sup>58</sup> *How a Rocket Took Off: Juniper Founder Pradeep Sindhu*, *supra* note 3, at 1.

<sup>59</sup> *Id.* at 13. Fig. 1 data is from the NVCA study. Anderson & Platzer, *supra* note 34, at 13. Note the spike in the period following 1990, when Congress firmly acted to establish a permanent H-1B visa allotment. *How a Rocket Took Off: Juniper Founder Pradeep Sindhu*, *supra* note 3, at 13. At that point, immigrant-founded companies significantly increased when compared to combined totals.

(Fig. 1) Immigrant Founded Public Companies by Year Established



### A. The "Cap" System

From inception, the H-1B program, despite its benefits, has raised concern due to the growing number of admissions and the fact that the program is not conditioned on any domestic labor market test.<sup>60</sup> In response, Congress chose to establish an admissions cap.<sup>61</sup> Since the initial 65,000 cap was established in 1990, Congress has amended the Immigration and Nationality Act to temporarily increase the cap and to provide for certain exemptions.<sup>62</sup>

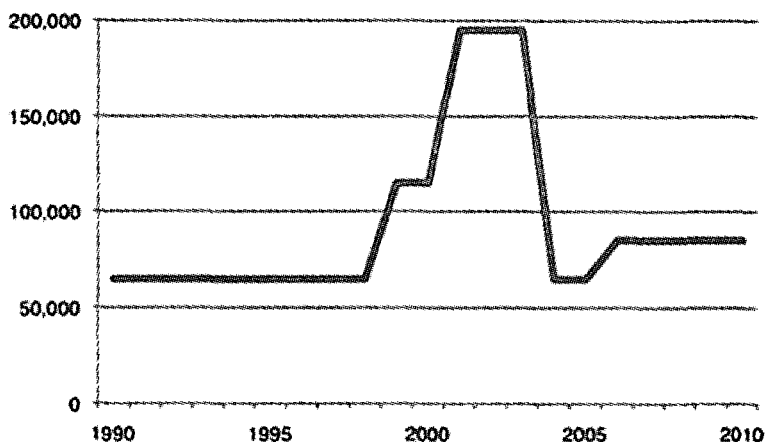
<sup>60</sup> *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings Before the Subcomm. of the Comm. on the Judiciary, supra* note 26, at 122. See H.R. REP. NO. 101-723, at 67 (1990).

<sup>61</sup> H.R. REP. NO. 101-723, at 67 (1990).

<sup>62</sup> 8 U.S.C. § 1184(g)(1)(A) (2006). The code exempts petitions for employment at institutions of higher education or related or affiliated nonprofit entities, or at nonprofit research organizations or governmental research organizations. 8 U.S.C. § 1184(g)(5)(A)-(B). See, H-1B Visa Reform Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809 (codified as amended at 8 U.S.C. § 1184(g)(5)(C) (2010)), which mandates that the first 20,000 H-1B petitions filed on behalf of aliens with U.S.-earned masters' or higher degrees will be exempt from any fiscal year cap on available H-1B visas. *Id.* Additional exemptions include petitions to extend an H-1B nonimmigrant's period of stay, change the conditions of the H-1B nonimmigrant's current employment, or request new H-1B employment filed on behalf of H-1B workers already in the United States. *Id.* Thus, they do not count against the H-1B fiscal year cap. *Id.*; see Fig. 2. *Id.*

Under the American Competitiveness and Workforce Improvement Act of 1998 (“ACWIA”), the annual ceiling of H-1B petitions for new employment was increased from 65,000 to 115,000 in 1999 and 2000 and to 107,500 in 2001.<sup>63</sup> The American Competitiveness in the Twenty-first Century Act (“AC21”) raised the limit on petitions in 2001 from 107,500 to 195,000 and in 2002 from 65,000 to 195,000.<sup>64</sup> The limit in 2003 was 195,000.<sup>65</sup> Starting in 2004, the H-1B cap reverted back to 65,000 per fiscal year and presently remains at that level.<sup>66</sup>

(Fig. 2) H-1B Cap Levels 1990-2010



## B. Definitions

H-1B immigrants are actually classified as “nonimmigrants.”<sup>67</sup> Instead of governing immigrant entry, the H-1B program governs “temporary work

<sup>63</sup> American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681. Congress enacted the new H-1B visa bill, ACWIA, as Title IV of Division C of the Omnibus Consolidated and Emergency Supplemental Appropriations Act 1999, Pub. L. 105-277, §§ 401-18, 112 Stat. 2681, 641-57 (1998). The legislation to increase the visa cap to 195,000 visas per year included the following language: “American companies today are engaged in fierce competition in global markets” and “are faced with severe high-skill labor shortages that threaten their competitiveness.” S. 1723, 105th Cong. § 2 (1998).

<sup>64</sup> American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, § 102(a)-(b), 114 Stat. 1251.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Table XVI(B), *Nonimmigrant Visas Issued by Classification*, 1999 DEP’T ST. VISA OFFICE ANN. REP. 1 (1999), <http://travel.state.gov/pdf/FY2003%20table%20XVIb.pdf>.

visas.”<sup>68</sup> According to the statutory language, H-1B visas may be issued to aliens, coming temporarily to the United States to perform services in a specialty occupation.<sup>69</sup> The specialty occupation requirement mandates that H-1B workers possess a theoretical and practical application of a body of highly specialized knowledge and a bachelor’s or higher degree in that specific specialty.<sup>70</sup> Thus, the program governs most admissions of temporary immigrants into the U.S. for employment in science and engineering.<sup>71</sup>

Further, the U.S. Code of Federal Regulations provides that an “employer” must file the H-1B petition.<sup>72</sup> The term employer is then defined as “a person, firm, corporation, contractor, or other association, or organization in the United States which . . .” (among other things) “[h]as an employer-employee relationship with respect to employees . . . as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee . . . .”<sup>73</sup> In the past, the USCIS has relied on common law principles and two leading Supreme Court cases in reaching employer-employee determinations.<sup>74</sup> However, understanding the definition of an employer-employee relationship is an important piece of the H-1B debate as recent administrative interpretations are likely to decrease the number of issuances.

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<sup>68</sup> See generally 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2006) (“H-1B” comes from the statutory sections where the law is codified). *Id.* This provision provides the statutory authority for the H-1B temporary worker program:

(a)(15) The term “immigrant” means every alien except an alien who is within one of the following classes of nonimmigrant aliens . . . (H) an alien (i)(a) [Deleted] (b) subject to section 212(j)(2) [8 U.S.C. § 1184(i)(1)] who is coming temporarily to the United States to perform service . . . in a specialty occupation described in [8 U.S.C. § 1184(i)(1)] or as a fashion model, who meets the requirements for the occupation specified in [8 U.S.C. § 1184(i)(2)] or, in the case of a fashion model, is of distinguished merit and ability . . . under [8 U.S.C. § 1182(n)(1)] . . . .”

*Id.*

<sup>69</sup> 8 U.S.C. § 1101(a)(15)(H)(i)(b).

<sup>70</sup> 8 U.S.C. § 1184(i)(1) (2006).

<sup>71</sup> *Id.*

<sup>72</sup> 8 C.F.R. § 214.2(h)(i)(A) (2010) (setting forth special requirements for admission, extension, and maintenance of status).

<sup>73</sup> 8 C.F.R. § 214.2(h)(ii)(4) (2010).

<sup>74</sup> Memorandum from Donald Neufeld, Assoc. Dir., Serv. Ctr. Operations, U.S. Citizens and Immigration Services, to Serv. Ctr. Directors 2010, WL 145862 (Jan. 8, 2010), <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>.

*C. Interpretation*

Under the common law agency test, the key determinant for an employer-employee relationship is an employer's right to control the means and manner in which the work is performed.<sup>75</sup> However, in *NLRB v. United Insurance Company of America*, the Court concluded that, "no magic phrase or formula" could be applied to find the answer.<sup>76</sup> Instead, all the facts and circumstances must be analyzed and considered with no one factor being determinative.<sup>77</sup>

Similarly, in *Nationwide Mutual Insurance Company v. Darden*, the Court found that a similar definition of employee, in the Employment Retirement Income Security Act, was "completely circular" and provided no guidance.<sup>78</sup> Thus, the Court adopted a common-law test, first used to decide whether a sculptor was an employee for purposes of the Copyright Act of 1976, to determine who qualifies as an employee.<sup>79</sup> In applying the common law formula, the Court decided that the case was distinguishable from its past decisions.<sup>80</sup>

<sup>75</sup> 20 C.F.R. § 655.715 (2010). Department of Labor's definition of "Employed, employed by the employer, or employment relationship."

<sup>76</sup> Nat'l Labor Relations Bd. v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968). In *National Labor Relations Board*, the Court looked at whether "debit agents" are "employees" who are protected by the National Labor Relations Act or "independent contractors" who are expressly exempted from the Act. *Id.* at 255.

<sup>77</sup> *Id.*

<sup>78</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992). In *Nationwide*, the insurance company's former agent brought action under the Employee Retirement Income Security Act ("ERISA") to recover retirement benefits. *Id.* at 320. On remand, the District Court found that agent was an employee, but that the extended earnings plan was not a "pension plan." *Id.* Appeal and cross appeal were taken. *Id.* The Court of Appeals affirmed. *Id.* Certiorari was granted. *Id.* The Supreme Court held that "employee," as used in the ERISA, incorporates traditional agency law criteria for identifying master-servant relationships. *Id.* at 323. ERISA's definition of employee: "any individual employed by an employer," 29 U.S.C. § 1002(6) is completely circular and explains nothing. *Nationwide* 503 U.S. at 323.

<sup>79</sup> *Violence v. Reid*, 490 U.S. 730, 740 (1989) (stating "we construe the term to incorporate 'the general common law of agency'").

<sup>80</sup> *Id.*

In *Reid*, the Court stated that, [i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. *Id.* Among the other factors relevant to this inquiry are [1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional

Although the Court, in *United States v. Silk*, previously looked at the “mischief to be corrected and the end to be attained,” the case was overruled.<sup>81</sup> The Court held that *Silk* was a “feeble precedent for unmooring the term [employee] from the common law.”<sup>82</sup> In creating a broader definition, the *Silk* decision went too far.<sup>83</sup> Further, the Court relied on the fact that Congress amended the statute to avoid the *Silk* implications and to reiterate the importance of common law principles.<sup>84</sup>

Similarly, in *Clackamas Gastroenterology Association v. Wells*, the Court sought to define employee to determine whether an individual could utilize anti-discrimination protections in the American’s with Disabilities Act.<sup>85</sup> The Court ruled as it did in *Nationwide* and again applied common

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projects to the hired party; [6] the extent of the hired party’s discretion over when and how long to work; [7] the method of payment; [8] the hired party’s role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; and [12] the tax treatment of the hired party.

*Id.*

<sup>81</sup> *United States v. Silk*, 331 U.S. 704, 705 (1947). *Silk* involves a suit to recover employment taxes exacted from employers by the IRS under the Social Security Act. *Id.* In both instances the taxes were collected on assessments made administratively by the IRS because the persons here involved were employees of the taxpayers. *Id.* The cases turn on a determination of whether the workers were employees under that Act or whether they were independent contractors. *Id.*

<sup>82</sup> *Id.* at 713.

<sup>83</sup> *Id.* at 712. In *Silk*, the Court held that:

[T]he terms “employment” and “employee,” are to be construed to accomplish the purposes of the legislation. *Id.* As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. *Id.* Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.

*Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Clackamas Gastroenterology Assoc. v. Wells*, 538 U.S. 440, 442 (2003). The Americans with Disabilities Act of 1990, 101 Pub. L. No. 336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101), like other federal anti-discrimination legislation, is inapplicable to very small businesses. Under the ADA an “employer” is not covered unless its work force includes “15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.” *Id.* The question in this case is whether four physicians

law rules to resolve the definition of an employee.<sup>86</sup> The answer to whether a person, a shareholder-director in this case, is an employee depends on all of the incidents of the relationship.<sup>87</sup> Ultimately, no one factor is decisive in defining an employer-employee relationship, which leaves agencies with wide latitude to craft statutory interpretations.<sup>88</sup>

## V. REGULATORY AND STATUTORY SHIFTS

Employers are eagerly awaiting comprehensive immigration reform and hope that Congress will make it easier to hire foreigners.<sup>89</sup> But, the agency tasked with administering the program is making it harder to obtain H-1B visas.<sup>90</sup> The United States Citizenship and Immigration Service ("USCIS"), part of the Department of Homeland Security and the agency tasked with regulating the H-1B program, has recently issued a number of directives reinterpreting key provisions of the program.<sup>91</sup> The interpretation debate is being partially fought in the courts, where cases by companies seeking continued utilization of the program continue to appear.<sup>92</sup> Statutes have also been enacted, which have raised fees and made it harder for corporations to secure H-1B visas.<sup>93</sup>

On January 8, 2010, the USCIS issued a memo that reinterprets the H-1B program to place added emphasis on the employee-employer relationship.<sup>94</sup> The emphasis has traditionally served as the basis for sponsor eligibility for the visa classification.<sup>95</sup> Resting on the lack of a clear definition for employer-employee relationships, the USCIS claims that there are problems identifying independent contractors, self-employed

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actively engaged in medical practice as shareholders and directors of a professional corporation should be counted as "employees." *Clackamas*, 538 U.S. at 442.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 447. Ironically, a broad reading of the term "employee" would tend to expand the coverage of the ADA by enlarging the number of employees entitled to protection and by reducing the number of firms entitled to exemption. *Id.* Thus, such a finding would be consistent with the statutory purpose of ridding the Nation of discrimination. *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Lieber, *supra* note 20.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Memorandum from Donald Neufeld, *supra* note 74.

<sup>95</sup> Rami D. Fakhoury, *The Neufeld memo: new ground rules for H-1B documentation*, INTERNATIONAL LAW OFFICE (Jan. 29, 2010), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=f68e66cf-ec57-483e-a48f-1cc2ec521c01&redir=1>. The Fakhoury Law Group provides immigration services for businesses involved in international recruiting and personnel relocation. *Id.*

beneficiaries, and beneficiaries placed at third-party worksites.<sup>96</sup> Further, the memo describes several scenarios involving types of cases that USCIS examiners should not approve.<sup>97</sup> While some third party arrangements meet the employer-employee relationship test, there are situations where the employer and beneficiary relationship does not exist.<sup>98</sup> Specifically, the USCIS will no longer recognize employees hired and assigned to third party worksites.<sup>99</sup>

The memo is a critical development for employer sponsors because it lays out an expanded list of documents in several categories that companies will now have to provide in their petitions for H-1B workers.<sup>100</sup> Previously, employers had no problems obtaining H-1B status for their employees.<sup>101</sup> However, employers across a variety of industries, including healthcare, information technology, education, engineering and manufacturing, are now receiving extensive requests for evidence and more petition denials.<sup>102</sup>

According to the USCIS rule, a petitioner-sponsor must affirmatively show that it, as the employer, will have the right to control the beneficiary's

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<sup>96</sup> Memorandum from Donald Neufeld, *supra* note 74.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*; see generally Interview by Economic Times Now with Senapathy "Kris" Gopalakrishnan, President and CEO, Infosys Technologies (Aug. 12, 2010). Although Gopalakrishnan did refer to Infosys as an "offshore services" company, he stated that his business actually increases the competitiveness of US corporations. *Id.* "Two-way trade" is happening through the utilization of individual competitive advantages held by various countries. *Id.* For instance, he explains: "if you are going to buy a commercial jet plane today, we will go to Boeing. Now when it comes to software services, the world is looking at India. Each country has its own competitive advantages." *Id.*

<sup>99</sup> Memorandum from Donald Neufeld, *supra* note 74.

<sup>100</sup> Kate Kalmykov, *Complaint Filed Challenging USCIS Guidance Relating to Employee-Employer Relationships in H-1B Petitions*, KLASKO IMMIGR. & NATIONALITY L. BLOG (June 14, 2010), <http://blog.klaskolaw.com/2010/06/14/complaint-filed-challenging-uscis-guidance-relating-to-employee-employer-relationships-in-h-1b-petitions/>. Klasko is a national immigration law firm that provides services to multinational corporations, small businesses, hospitals, universities and research institutions. *Id.*; see Memorandum from Donald Neufeld, *supra* note 74. The petitioner bears the burden of proof in showing that an employer-employee relationship, as defined by the USCIS, will exist and must also establish that the elements will continue to exist throughout the duration of the validity period. *Id.* Documents mentioned include: itineraries of services with dates, names, and addresses of each service; copy of signed employment agreement; copy of employment offer letter; relevant portions of contracts between employer and employee; statements of work; position descriptions; performance review documents; organizational charts. *Id.*

<sup>101</sup> Kalmykov, *supra* note 100.

<sup>102</sup> *Id.*



work.<sup>103</sup> Further, the sponsor must demonstrate that the elements will continue to exist throughout the duration of the H-1B issuance.<sup>104</sup> The USCIS may also submit requests for additional information, such as itineraries of service dates and locations.<sup>105</sup> Ultimately, the cost for a company to administer an H-1B program is on the rise.

In response, on June 8, 2010, a number of technology companies jointly filed a complaint in the United States District Court for the District of Columbia, challenging the authority of the USCIS to apply the guidance ("Neufeld Memo") related to employee-employer relationships in H-1B petitions.<sup>106</sup> The companies contend that IT staffing, generally a third party arrangement, is a lawful business model and that it greatly benefits businesses, workers and the economy.<sup>107</sup>

The complaint rests on the assumption that the USCIS violated the Administrative Procedures Act, which requires agencies to conduct an analysis of the impact of a new rule on small businesses.<sup>108</sup> While the new interpretation creates a potential burden for small business, which lack the resources of large tech giants, the District Court dismissed the case on August 13, 2010.<sup>109</sup> The court concluded that the memo was merely an interpretive guideline for the implementation of CFR regulations and does not bind the USCIS.<sup>110</sup> For technology firms, the result is an increasingly regulated hiring environment, which may lead to a further decline in the number of H-1B filings.

While the H-1B application process is becoming increasingly mired in regulatory requirements, recent statutory enactments and agency rulings

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<sup>103</sup> Kate Kalmykov, *USCIS Introduces E-Verify Self-Check*, KLASKO IMMIGR. & NATIONALITY L. BLOG (Jan. 18, 2010), <http://blog.klaskolaw.com/2011/03/10/uscis-introduces-e-verify-self-check/>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Broadgate, Inc., et al. v. U.S. Citizenship & Immigr. Serv., et al*, 730 F. Supp. 2d. 240 (D.D.C. 2010). Plaintiffs included Broadgate, Inc., Logic Planet, Inc., DVR Softek Inc., TechServe Alliance, and the American Staffing Association.

<sup>107</sup> *June 2010 Newsletter*, KLASKO IMMIGR. & NATIONALITY L. NEWSLETTER, <http://www.klaskolaw.com/newsletters.php?action=view&id=296> (last visited Mar. 15, 2011). Mark Roberts, the Chief Executive Officer of TechServe Alliance states: "The government should not be allowed to attack the industry by circumventing the rule-making process and reversing longstanding policy by decree." *Id.*

<sup>108</sup> *Lawsuit Challenges H-1B Memo on Employer-Employee Relationship*, KUCK IMMIGRATION PARTNERS, LLC, <http://www.immigration.net/news-and-articles/midjune2010news/article3> (last visited Mar. 15, 2011). Kuck Immigration Partners is a national immigration law firm. The firm is led by Charles H. Kuck, former National President of the American Immigration Lawyers Association. *Id.*

<sup>109</sup> *Broadgate*, 730 F. Supp. 2d at 247.

<sup>110</sup> *Id.* at 246.

have also led to an increase in fees. Fee changes directly raise the cost of hiring foreign workers. On August 13, 2010, the same day that *Broadgate* was dismissed, President Obama signed into law Public Law 111-230.<sup>111</sup> This Act contains provisions to increase certain H-1B fees.<sup>112</sup> The law requires the submission of an additional \$2250 fee for certain H-1B petitions and will remain in effect through 2014.<sup>113</sup> The fees apply to sponsors whose staff is more than fifty percent H-1B status with more than fifty employees in the United States.<sup>114</sup>

Similarly, the USCIS announced its final rule adjusting fees for immigration applications and petitions on September 24, 2010.<sup>115</sup> Because the entities affected by the final rule are those that file and pay fees for immigration applications on behalf of aliens, petitioners of nonimmigrant workers, H-1B petitioners included, will pay more to file an I-129 form.<sup>116</sup> In response to comments on the June rule proposal, the USCIS addressed the complexity of the new fee schedule.<sup>117</sup> The agency attempted to clarify that the calculation of fees includes direct processing costs and other costs related to producing and delivering documents when delivery is part of the processing of a particular application.<sup>118</sup>

However, the service went on to state that, in addition, the fee calculation model factors in the full costs of USCIS operations, including services provided to other applicants and petitioners, overhead costs and other processing costs.<sup>119</sup> With the new \$1000 fee requirement for certain

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<sup>111</sup> Act of August 13, 2010, Pub. L. No. 111-230 § 402(b), 124 Stat. 2487. The text of the enactment reads:

Notwithstanding any other provision of this Act or any other provision of law, during the period beginning on the date of the enactment of this Act and ending on September 30, 2014, the filing fee and fraud prevention and detection fee required to be submitted with an application for admission as a nonimmigrant under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(i)(b)) shall be increased by \$2,000 for applicants that employ [fifty] or more employees in the United States if more than 50 percent of the applicant's employees are such nonimmigrants or nonimmigrants described in section 101(a)(15)(L) of such Act.

*Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* § 402(a).

<sup>114</sup> *Id.*

<sup>115</sup> U.S. Citizenship and Immigration Fee Schedule, 75 Fed. Reg. 58962 (Sept. 24, 2010) (codified at 8 C.F.R. pts. 103, 204, 244, and 274A).

<sup>116</sup> U.S. Citizenship and Immigration Fee Schedule, 75 Fed. Reg. at 58984.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

H-1B applications—the standard H-1B application is currently set at \$325—petitioners covered under the new fee schedule may be picking up the tab for a myriad of other applicants.<sup>120</sup> The increase in fees is added on top of the fees already required to file a nonimmigrant worker petition. Those include the \$1500 base processing fee, existing fraud prevention and detection fee and the “American Competitiveness and Workforce Improvement” fee.<sup>121</sup> The final rule is likely to increase overall fees by an average of about ten percent.<sup>122</sup>

The new law, by burdening petitioners through a cost deferral mechanism, provides a disincentive to hire foreign talent.<sup>123</sup> In fact, the USCIS acknowledges that this rule will affect small entities, including small businesses filing I-129 petitions.<sup>124</sup> The fee schedule is predicted to have an annual economic effect of at least \$100 million.<sup>125</sup>

## VI. IMPACT

“Imagine innovation in America without Andy Grove, without Jerry Yang, without Sergey Brin. These Immigrants have contributed enormously to innovation and our well-being.” – John Doerr, Partner at Kleiner Perkins Caufield & Byers<sup>126</sup>

Krishna Bharat is credited by Google for developing its Google News service.<sup>127</sup> He joined the company in 1999 through the H-1B program.<sup>128</sup> In fact, between 1200 and 1800 of Google’s 20,000 employees were born abroad and work on temporary visas.<sup>129</sup> Microsoft claims thirty-five percent of its U.S. patent applications came from new inventions by visa and green-card holders. Similarly, researchers, as part of the NVCA study, analyzed company perspectives on H-1B visas and overall U.S. immigration policy.<sup>130</sup> Of over 340 privately held, venture-backed

<sup>120</sup> *Id.*

<sup>121</sup> 8 U.S.C. § 1184(c)(9)(B), (c)(12)(A) (2006).

<sup>122</sup> Jennifer Hermansky, *USCIS Issues a Final Rule Adjusting Fees for Immigration Benefits*, KLASKO IMMIGR. & NATIONALITY L. BLOG (Sept. 24, 2010), <http://blog.klaskolaw.com/category/agency-updates/>.

<sup>123</sup> U.S. Citizenship and Immigration Fee Schedule, 75 Fed. Reg. at 58982.

<sup>124</sup> *Id.* at 58964.

<sup>125</sup> *Id.*

<sup>126</sup> Anderson & Platzer, *supra* note 34, at 13 (citing statement by John Doerr, a partner at Kleiner Perkins Caufield & Byers, a world leading venture capital firm located in Silicon Valley).

<sup>127</sup> Krishna Bharat, *Google Research Scientists and Engineers*, GOOGLE, <http://research.google.com/people/krishna/> (last visited Mar. 15, 2011).

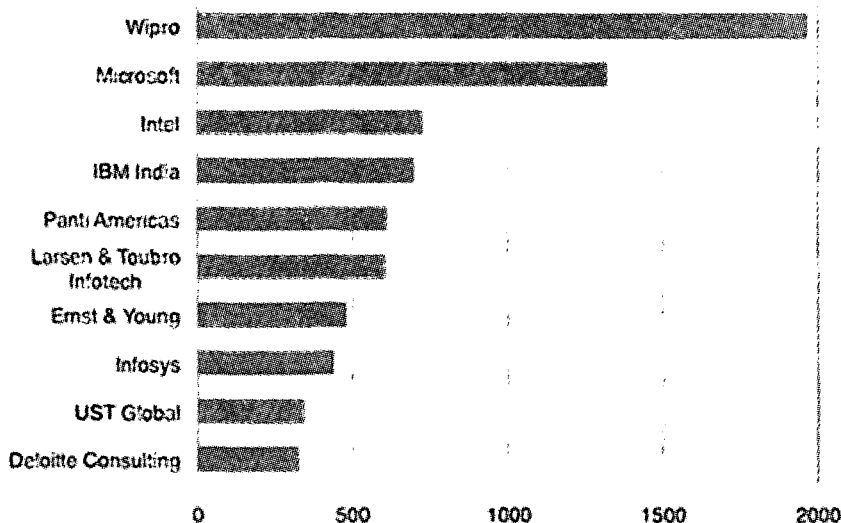
<sup>128</sup> *Id.*

<sup>129</sup> Richtel, *supra* note 16.

<sup>130</sup> Anderson & Platzer, *supra* note 34, at 5.

companies in the U.S., the study found that sixty percent were H-1B visa sponsors.<sup>131</sup> Thus, with the changing regulatory climate, the future of foreign entrepreneurship is at stake. The H-1B program is changing in ways that threaten the future ability of companies to take advantage of foreign talent.

(Fig. 3) Top 10 H-1B Employers in 2009



The breadth and importance of the H-1B program is illustrated by a list of companies that employ H-1B visa holders.<sup>132</sup>

<sup>131</sup> *Id.* at 21.

<sup>132</sup> Patrick Thibodeau, *List of Companies Employing H-1B Workers*, COMPUTERWORLD (Dec. 14, 2009, 6:02 AM), [http://www.computerworld.com/s/article/9142152/List\\_of\\_H\\_1B\\_visa\\_employers\\_for\\_2009](http://www.computerworld.com/s/article/9142152/List_of_H_1B_visa_employers_for_2009). Other top H-1B employers include Qualcomm, Cisco Systems, Accenture, KPMG, Oracle, Polaris Software, Rite Aid, Goldman Sachs, Deloitte, Google, Motorola, and Bloomberg, all with over 200 H-1B employees. *List of Companies Employing H-1B Workers. Id.* Wipro is one of the largest global IT services and product engineering companies. *About Us*, WIPRO IT BUSINESS, <http://www.wipro.com/corporate/aboutus/index.htm> (last visited Mar. 15, 2011). Wipro is a \$6 billion company and employs over 100,000 associates from over seventy nationalities in over fifty-five countries. *Id.* Its services span financial services, retail, transportation, manufacturing, healthcare services, energy and utilities, telecom and media. *Id.* IBM India Private Limited, a division of IBM, is the only IT company in the world that offers end-to-end solutions to customers from hardware to software, services and consulting. *About IBM*, IBM, <http://www.ibm.com/ibm/in/en/> (last visited Mar. 4, 2011). With its Americas Division, Patni is one of the leading global providers of IT services and business solutions. *Corporate Fact Sheet*, PATNI, <http://www.patni.com/media/538841/>

*A. Impact on Innovation (what happens if there are less H-1B  
immigrants?)*

While the number of visa holders is small compared with the U.S. work force overall, their contribution is huge. Specifically, economists William R. Kerr and William F. Lincoln evaluated the impact of high-skilled immigrants on U.S. technology formation.<sup>133</sup> In conducting the study, Kerr found that immigrants represented twenty-four percent and forty-seven percent of the U.S. science and engineering workforce with bachelors and doctorate educations in the 2000 census, respectively (compared to immigrant workers overall, who comprise twelve percent of the US working population).<sup>134</sup>

Through the analysis of micro-data on all U.S. patent grants and applications through 2009, Kerr found that ten percent growth in the national H-1B population corresponded with a two percent to four percent higher growth in immigrant science and engineering employment.<sup>135</sup> Similarly, the same ten percent growth in H-1B population corresponded with a 0.5% higher growth in *total* science and engineering employment.<sup>136</sup> The findings are relevant because science, engineering and computer-related occupations account for approximately sixty percent of H-1B admissions, and changes in the H-1B population account for a significant share of the growth in the U.S. immigrant science and engineering population.<sup>137</sup>

Similarly, the study found increases in inventions after analyzing patents issued to 'likely' immigrants.<sup>138</sup> While the study did not directly observe immigration status, micro-level data allowed analysis of the H-1B program, where no other data exist.<sup>139</sup> Specifically, the study looks at the annual patenting contributions of Indian and Chinese ethnicity inventors within companies.<sup>140</sup> Overall, a ten percent increase in H-1B admissions corresponded to "a .3-.7% increase in total invention for each standard deviation growth in city dependency."<sup>141</sup> Of particular note, the same ten

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Corporate\_Fact\_Sheet.pdf (last visited Mar. 15, 2011). Patni is a \$656 million company. *Id.*

<sup>133</sup> William R. Kerr & William F. Lincoln, *The Supply Side of Innovation: H-1B Visa Reforms and U.S. Ethnic Invention*, 28 U. CHI. J. OF LAB. ECON. 473, 473 (July 2010).

<sup>134</sup> *Id.* at 474.

<sup>135</sup> *Id.* at 475, 491.

<sup>136</sup> *Id.* at 475.

<sup>137</sup> *Id.* at 474, 482.

<sup>138</sup> *Id.* at 475.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

percent increase corresponded to a one to four percent increase in Chinese and Indian invention.<sup>142</sup>

The findings are robust and hold up to a variety of regression controls such as technology trends, labor market conditions and other fixed outside effects.<sup>143</sup> Also, Anglo-Saxon invention, the source of nearly seventy percent of U.S. patents, remained practically uncorrelated to any changes in H-1B upticks.<sup>144</sup> Thus, the study rules out any crowding-out effect of the H-1B program.<sup>145</sup> In other words, the program does not cost Americans jobs. In contrast, the new restrictions on H-1B visas raise the cost of petitions and may actually decrease domestic invention rates.<sup>146</sup>

*B. The Laws: will they decrease H-1B workers?*

H-1B visas are important for U.S. employers because of the impracticability of hiring someone directly on a green card.<sup>147</sup> Due to inadequate legal immigration quotas, the wait time for permanent residence can be up to five years.<sup>148</sup> Yet, at current levels, there are not enough H-1B visas to satisfy demand.<sup>149</sup> Generally, the H-1B visa quota is met within days of the application window opening.<sup>150</sup> However, the H-1B cap was not met during the tech-recession in 2001 and applications for visas were slower in 2009 and 2010, a result of the recent economic downturn.<sup>151</sup>

The tech recession in 2001 helped the decline during that period versus the decline beginning in 2007 prior to the global recession.<sup>152</sup> However, even as the global recession progressed, employers quickly exhausted the 65,000 visas available.<sup>153</sup> By April of 2008, the cap was exhausted.<sup>154</sup> In

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 475.

<sup>146</sup> *Id.*

<sup>147</sup> Anderson & Platzer, *supra* note 34, at 8.

<sup>148</sup> *Id.* at 21.

<sup>149</sup> *Id.*

<sup>150</sup> Jordan, *supra* note 18. Miriam Jordan reports that, “[y]ear after year, U.S. businesses brace for ‘visa-roulette,’ as applications to bring in highly skilled foreign workers far outstripped demand, forcing the government to hold a lottery to award them.”

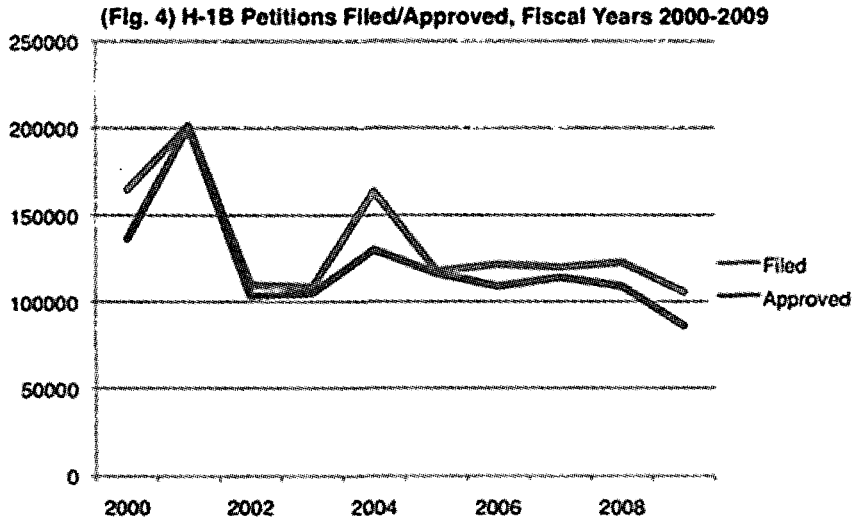
<sup>151</sup> *Id.*

<sup>152</sup> Table XVI(B), *Nonimmigrant Visas Issued by Classification*, *supra* note 67. Chart numbers seem inflated due to the numerous exemptions set forth in 8 U.S.C. § 1184(g)(1)(A). *Id.*; see *How a Rocket Took Off: Juniper Founder Pradeep Sindhu*, *supra* note 3, at 13.

<sup>153</sup> Jordan, *supra* note 18.

<sup>154</sup> USCIS REACHES FY 2009 H-1B CAP, U.S. CITIZENSHIP AND IMMIGR. SERV. (Apr. 8, 2008), available at <http://www.uscis.gov/portal/site/uscis/>

contrast, as of September 25, 2009, nearly six months after the U.S. government began accepting applications; only 46,700 petitions had been filed.<sup>155</sup>



This year, despite the slow economic recovery, David Leopold, Cleveland immigration attorney and current President of the American Immigration Lawyers Association, expects that visa slots will be filled by January 2011.<sup>156</sup> As of November 26, 2010, 50,400 of the 65,000 available petitions and 18,400 of the 20,000 master's degree exemption petitions have been filed.<sup>157</sup> The recent economic crisis, if anything, illustrates that the market will temper demand when necessary.<sup>158</sup> Thus, while the statutory limit on H-1B issuances is not the sole driver of demand for visas, it is an important part of the equation.<sup>159</sup>

Aside from the "cap" and the economy, the latest developments in the law are affecting the future of the program. Companies have curbed applications in the face of anti-immigrant sentiment in Washington and

menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=c5b6628090e29110VgnVCM1000004718190aRCRD&vgnnextchannel=b56db6f2cae63110VgnVCM1000004718190aRCRD (U.S. Citizenship and Immigration Services ("USCIS") received enough H-1B petitions to meet the congressionally mandated cap for fiscal year 2009. USCIS also received more than 20,000 H-1B petitions filed on behalf of persons exempt from the cap under the "advanced degree" exemption).

<sup>155</sup> *Id.*

<sup>156</sup> Farrell, *supra* note 21.

<sup>157</sup> USCIS REACHES FY 2009 H-1B CAP, *supra* note 154.

<sup>158</sup> Jordan, *supra* note 18.

<sup>159</sup> *Id.*

rising costs associated with hiring foreign-born workers.<sup>160</sup> Companies are taking longer and spending more money to file H-1B petitions.<sup>161</sup> The cost and bureaucracy of applying for H-1B visas is a deterrent.<sup>162</sup>

Lawyers' fees, filing fees and other expenses can easily reach \$5000 per applicant.<sup>163</sup> Google estimates that it spends about \$20 million a year on its immigration efforts—including lobbying, administration, and legal fees.<sup>164</sup> Its in-house immigration team numbers twenty lawyers and staff members.<sup>165</sup> Similarly, the Wall Street Journal recently cited Milwaukee immigration lawyer Jerome Grzeca, whose employment-visa business is down forty percent since 2008.<sup>166</sup>

The troubling concern is that small businesses, with fewer resources than large corporations, are struggling to obtain the valuable visas.<sup>167</sup> Grzeca stated that the overall program has become invasive and burdensome and that potential employers are putting off hiring because of the overall environment.<sup>168</sup> The bottom line is that the federal agencies that approve visas are making it more expensive for businesses to hire foreigners.<sup>169</sup>

Further, general administrative costs are bogging down business.<sup>170</sup> The NVCA report also noted an increase in complaints by employers regarding the process.<sup>171</sup> The report by the USCIS ombudsman said officers last year roughly doubled requests for additional evidence to support applications for H-1B visas, which industry experts say typically results in delays or denials.<sup>172</sup> Similarly, New Enterprise Associates' Scott Sandell, who invests in companies in Silicon Valley and China, recently said that "immigration agents are more overwhelmed and seem to have more trouble processing applications than they ever have."<sup>173</sup> He claims that it has been worse since the new regulations were enacted in 2010.<sup>174</sup>

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<sup>160</sup> Leiber, *supra* note 20.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Richtel, *supra* note 16.

<sup>165</sup> *Id.*

<sup>166</sup> Jordan, *supra* note 18.

<sup>167</sup> Leiber, *supra* note 20.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Anderson & Platzer, *supra* note 34.

<sup>172</sup> Leiber, *supra* note 20.

<sup>173</sup> Farrell, *supra* note 21.

<sup>174</sup> *Id.*



Part of the problem: the USCIS Neufeld memo.<sup>175</sup> In answering the call to cut domestic job loss, the agency is focusing on employer-employee relationships instead of the specialty skill requirement. However, the purpose of the H-1B program is to supply highly skilled workers for United States employers. Immigration policy should create an environment that allows as many qualified and talented people as possible, especially given global competition for talented minds. Again, looking at the H-1B program as a business incubator, the benefits are potentially huge.<sup>176</sup> Thus, if the USCIS focused on the first requirement, admitting only the most qualified individuals, value-creating opportunities would be maximized.

Instead, employers are given the burden of affirmatively proving an employer-employee relationship.<sup>177</sup> While, the USCIS intends the regulations to address an alleged loophole in the program, the test overreaches by drawing in all businesses.<sup>178</sup> Further, the USCIS has relied on agency rulings and two major Supreme Court cases when making these determinations.<sup>179</sup> However, as the Court noted in *Clackamas*, the particular factors are not directly applicable because “we are not faced with drawing a line between employees and [independent contractors] or director-shareholder employees.”<sup>180</sup> Thus, the USCIS, with the support of the court system, has effectively infused two arguably distinguishable situations into H-1B law.

In *Silk*, which interpreted “employee” for the purpose of the Americans with Disabilities Act, the Court read “employee” to imply something broader than the common-law definition.<sup>181</sup> However, Congress amended the statute to demonstrate that the usual common law principles were the key.<sup>182</sup> By issuing the Neufeld memo, the USCIS is seeking to broaden the language of 8 U.S.C. § 1101, to target IT staffing agencies.<sup>183</sup> At the very least, the service appears to be twisting the rules to get a particular result. Therefore, it seems that the same reasoning in *Nationwide* and *Clackamas* would apply because the agency interpretation seeks to broaden the statutory language for a specific purpose.<sup>184</sup>

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<sup>175</sup> Memorandum from Donald Neufeld, *supra* note 74.

<sup>176</sup> Bandyk, *supra* note 45. The United States Small Business Administration notes that sustained economic benefits from entrepreneurship derives mainly from young (two to five year old), medium sized (20 to 500 employee) enterprises.

<sup>177</sup> Memorandum from Donald Neufeld, *supra* note 74.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 445 (2003).

<sup>181</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992).

<sup>182</sup> *Id.*

<sup>183</sup> Memorandum from Donald Neufeld, *supra* note 74.

<sup>184</sup> *Clackamas*, 538 U.S. at 445; *Nationwide*, 503 U.S. at 324.

*C. The Outcome: what are people saying about the impact?*

High-tech firms and H-1B employers, generally, argue that higher H-1B admissions are necessary to keep U.S. businesses competitive.<sup>185</sup> These proponents claim that the program has spurred innovation and growth and kept firms from shifting their operations abroad.<sup>186</sup> On the other hand, the opponents argue that the program displaces American workers, lowers wages, and discourages on-the-job training.<sup>187</sup>

Senator Jeff Sessions (R-Alabama), echoing these concerns, claims that “[n]ot all our own people are able to get good jobs right now.”<sup>188</sup> He favors broad immigration reform that puts an even greater focus on protecting American jobs.<sup>189</sup> Similarly, Senators Dick Durbin (D-Illinois) and Charles Grassley (R-Iowa) have led the effort to keep the caps in place and tighten regulations.<sup>190</sup> Grassley states, “With unemployment at rates higher than we’ve seen in decades, there is no shortage of people looking for work.”<sup>191</sup> Thus, Washington seems to be digging in for a drawn out fight.<sup>192</sup>

With its recent administrative rulings, the USCIS is changing the employer-employee relationship test in direct response to companies like Wipro and Infosys.<sup>193</sup> But even if there is concern about companies that provide source-outsourcing, the broader economy may still benefit from the H-1B program.<sup>194</sup> S. Gopalakrishnan, CEO of Infosys, states the negative

<sup>185</sup> Richtel, *supra* note 16.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*; see generally *Immigration Hearings*, *supra* note 26.

<sup>189</sup> Richtel, *supra* note 16.

<sup>190</sup> Julia Preston, *A Rush for Work Visas Even as Demand Dips*, N.Y. TIMES, Apr. 2, 2009, at A17.

<sup>191</sup> *Id.*

<sup>192</sup> Gerald F. Seib, *Worried Americans Look Inward*, WALL ST. J., Aug. 18, 2010, at A2. Seib reports that “[t]he real question isn’t why these feelings are in the air—that’s obvious enough—but which leaders in both political parties will push back against them, in this fall’s campaign and beyond.”

<sup>193</sup> Interview by Economic Times Now, *supra* note 98; see Memorandum from Donald Neufeld, *supra* note 74. While the recent agency changes seem to be geared toward “job shops,” it is clear that these changes will increase administrative and agency costs across the board. Increases in costs due to document production, monitoring and control systems and attorneys’ fees are but a few of the most “tangible” effects. *Id.* Further, economic “opportunity loss” is an important concern, as companies, unable to secure qualified employees, are forced to abandon projects. *Id.*

<sup>194</sup> Memorandum from Donald Neufeld, *supra* note 74. Is it ironic that the outsourcing label portrays the idea that jobs are being taken to India, when companies like Wipro and Infosys are placing Indian immigrants (among others) with corporations inside the United States? *Id.* Further, H-1B employees pay federal income tax (if not exempt by treaty), Social Security tax, Medicare tax and

sentiment in Washington is due to the need to find a scapegoat for recent unemployment trends.<sup>195</sup> He claims that offshore service companies, particularly in the IT business, are not taking too many jobs away from the United States.<sup>196</sup> Citing a recent study, he recalls that service companies like Infosys were found to have actually increased competitiveness among corporations in the United States, creating cost savings.<sup>197</sup> Thus, the system allows corporations to turn around and invest their time and money in new products, services and jobs.<sup>198</sup>

Further, the talent and compensation war is surging through Silicon Valley and among tech startups around the United States.<sup>199</sup> In fact, “[a]mong companies who use H-1B visas, nearly forty percent said the lack of H-1B visas . . . has ‘negatively impacted [their] company when competing against other firms globally.’”<sup>200</sup> Pablo Chavez, Google’s senior policy counsel, says that “[t]he next generation of Google engineers are being turned down.”<sup>201</sup> He claims that “[i]f a foreign-born engineer doesn’t come to Google, there is a very good chance that individual will return to India to compete against us.”<sup>202</sup> Ultimately, competition is a reality.<sup>203</sup>

Similarly, the National Science Foundation notes that the growth rate of the science and engineering labor force will be significantly reduced if the United States becomes less successful in the increasingly competitive international market for scientists and engineers.<sup>204</sup> David Cowan, of Bessemer Venture Partners, says “[i]t’s the worst I’ve seen since the late 1990’s . . . there are lots of talented engineers around the world. If we invited them to participate in our industry here in the U.S. we would see more Googles and Facebooks.”<sup>205</sup>

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any applicable state taxes. *Id.* In many cases, the H-1B visa is a springboard to permanent residency. *Id.*

<sup>195</sup> Interview of Gopalakrishnan, *supra* note 98.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Steve Lohr, *A Solution to the High-Tech Immigration Challenge*, N.Y. TIMES BITS BLOG (Aug. 22, 2007, 4:26 PM), <http://bits.blogs.nytimes.com/2007/08/22/a-solution-to-the-high-tech-immigrant-challenge/>.

<sup>200</sup> Anderson & Platzer, *supra* note 34, at 7.

<sup>201</sup> Richtel, *supra* note 16, at 6.

<sup>202</sup> *Id.*

<sup>203</sup> See Farrell, *supra* note 21.

<sup>204</sup> Anderson & Platzer, *supra* note 34, at 8.

<sup>205</sup> Farrell, *supra* note 21; see generally James Altucher, *Why Facebook is Worth \$50 Billion*, FIN. ADVISER WSJ BLOGS (Jan. 5, 2011, 8:50 AM), <http://blogs.wsj.com/financial-adviser/2011/01/05/why-facebook-is-worth-50-billion/>. (Google currently “has a \$200 billion market cap and \$30 billion in annual sales.” According to Altucher, Facebook is “right where Google was” at its initial public offering, “but with faster growth.”).

Business leaders point to the current education system as something that needs to be fixed.<sup>206</sup> At many American universities, more than half of the graduates with advanced degrees in science and engineering are foreign.<sup>207</sup> Stuart Anderson, executive director of the National Foundation for American Policy, explains that H-1B visas are the most practical way for employers to hire enough engineers and technologists.<sup>208</sup> Craig Barrett, the chairman of Intel, states that “[w]e are watching the decline and fall of the United States as an economic power—not hypothetically, but as we speak.”<sup>209</sup> The current changes, which effectively curb the H-1B program, will deal a major blow to the economy.<sup>210</sup>

The stopgap, business leaders say, is to let companies hire more foreign engineers.<sup>211</sup> In fact, one-third of the privately held venture-backed companies responding to the NVCA survey said the lack of H-1B visas had influenced their firms’ decisions to place more personnel in facilities abroad.<sup>212</sup> One company, as part of the NVCA study, responded that after an unsuccessful H-1B bid for an engineering team leader, the company was forced to hire “[twenty-five] engineers outside the [United States], where the team leader resides.”<sup>213</sup> When companies cannot get visas for people it wants to hire, it seeks to accommodate them in overseas offices, like bureaus in Britain and Brazil.<sup>214</sup> Companies then try to network members

<sup>206</sup> Richtel, *supra* note 16, at 2.

<sup>207</sup> Anderson & Platzer, *supra* note 34, at 27.

<sup>208</sup> *Id.* at 21 (Anderson has studied the actual use of H-1B visas.).

<sup>209</sup> Richtel, *supra* note 16, at 2; *see generally* Craig R. Barrett, Intel, Corp., *Intel Executive Biography*, INTEL, <http://www.intel.com/pressroom/kits/bios/barrett/bio.htm> (last visited Jan. 4, 2011).

Craig Barrett was born in San Francisco, California. He attended Stanford University in Palo Alto, California from 1957 to 1964, receiving Bachelor of Science, Master of Science and Ph.D. degrees in Materials Science. After graduation, he joined the faculty of Stanford University in the Department of Materials Science and Engineering, and remained through 1974, rising to the rank of Associate Professor . . . .

Dr. Barrett joined Intel Corporation in 1974 and held positions of vice president, senior vice president and executive vice president from 1984 to 1990. In 1992, he was elected to Intel Corporation’s Board of Directors and was promoted to chief operating officer in 1993. Dr. Barrett became Intel’s fourth president in 1997, chief executive officer in 1998 and chairman of the Board in 2005.

*Id.*

<sup>210</sup> *See* Richtel, *supra* note 16.

<sup>211</sup> *Id.*

<sup>212</sup> Anderson & Platzer, *supra* note 34, at 7.

<sup>213</sup> *Id.* at 24.

<sup>214</sup> Richtel, *supra* note 16, at 5.

together for meetings via video conference.<sup>215</sup> As part of the NVCA study, more than two-thirds of immigrant entrepreneurs agreed that U.S. immigration policy has made it more difficult to start a business in the United States.<sup>216</sup>

The result? One venture-backed company claims that the limited access to foreign talent results in longer and more expensive product development cycles.<sup>217</sup> The biggest losers are employers, particularly small businesses that lack the option of overseas placement for new employees. Without the extensive resources and operations of large corporations, small businesses may be forced to forgo business plans entirely.

Ultimately, fewer bright, creative, inspired risk takers and innovative entrepreneurs will be available to jump-start the U.S. economy. Instead, countries like China, India and Brazil will continue reaping the benefits of sustained economic growth. Continued success, like that in places such as Silicon Valley, is threatened by the shift in how we treat foreign born entrepreneurs.

## VII. CONCLUSION

“You can go to live in France, but you don’t become a Frenchman; you can go to live in Germany, you cannot become a German . . . [b]ut . . . anyone, from any corner of the world, can come to live in America and be an American.”<sup>218</sup> What gives foreigners the right to come here and create American jobs? In part, the H-1B visa program serves that purpose.<sup>219</sup> H-1B visas have allowed thousands of foreign born entrepreneurs—engineers, scientists, and other highly skilled specialty workers to enter the United States and create value for the U.S. economy.<sup>220</sup> The net effect is technological growth, innovation and more jobs for people in the United States.<sup>221</sup> Immigrant technologists, like Pradeep Sindhu, add to the innovative spirit and human capital that drives the American economy.<sup>222</sup>

<sup>215</sup> *Id.*

<sup>216</sup> Anderson & Platzer, *supra* note 34, at 7.

<sup>217</sup> *Id.* at 24.

<sup>218</sup> Ronald Reagan, former President of the United States, Speech at Moscow State University (May 31, 1988).

<sup>219</sup> See H.R. REP. NO. 101-723, at 67; see also *Immigration Hearings*, *supra* note 26, at 314.

<sup>220</sup> Anderson & Platzer, *supra* note 34, at 6–7.

<sup>221</sup> Kerr, *supra* note 133, at 474.

<sup>222</sup> Vivek Wadhwa, *The Immigration Brain Drain: Throwing Out the Baby with the Bath Water?*, NBIZ, Summer 2007, at 8.

Two of the most important questions now being debated in the U.S. are the effects of globalization and immigration on the nation’s economy. Globalization is accelerating and it is still not

Yet, given recent developments in the law and the statistics showing declining numbers, Washington appears to be taking a more hostile approach to the issuance of H1-B visas. Like other quick fixes, protectionist measures seem like the right decision in hard economic times—or at the least the politically safe decision.<sup>223</sup> Ultimately, the changes are a huge step backward.

Moving forward, policymakers need to realize the significant contribution of immigrant entrepreneurs to job creation and innovation.<sup>224</sup> If the U.S. economy seeks to lead the world technologically, an easy first step would be to open channels for highly skilled workers through the H-1B program. Instead of turning future innovators and entrepreneurs away, the United States should embrace the H-1B program as a way to drive economic growth.<sup>225</sup> In the end, continued innovation and entrepreneurship in the United States depends, at least in part, on skilled temporary foreign workers.

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clear whether trends like outsourcing will erode U.S. competitiveness or provide long-term benefits. The focus of the immigration debate is on the plight of millions of unskilled immigrants who entered the U.S. illegally. Forgotten in this debate are the hundreds of thousands of skilled immigrants that enter the country legally . . . . [T]hese skilled immigrants provide the U.S. a greater global edge. They contribute to the economy, create jobs, and lead innovation. Immigrants are fueling the creation of hi-tech business across our nation and creating a wealth of intellectual property . . . . Our short-term solutions to global competitiveness may actually be creating long-term problems.

*Id.*

<sup>223</sup> Seib, *supra* note 193. Seib reports on this familiar trend:

Economic stress has a way of bringing underlying tensions and suppressed emotions to the surface, for people and nations alike. That's certainly true for the U.S., where economic anxiety tends to bubble up in three related forms: isolationism, protectionism and anti-immigration sentiment . . . The most obvious example is the recently revived debate over immigration.

*Id.*

<sup>224</sup> Anderson & Platzer, *supra* note 34, at 6; WADHWA ET AL., *supra* note 39; Kerr & Lincoln, *supra* note 134, at 474.

<sup>225</sup> Lohr, *supra* note 199.